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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

H. RAY LAHR,

Plaintiff,

v.

NATIONAL TRANSPORTATION

SAFETY BOARD, *et al.*,

Defendants.

No. CV 03-08023-AHM (RZx)

Date: July 10, 2006

Time: 10 a.m.

Judge: Hon A. Howard Matz

1. REPLY IN SUPPORT OF DEFENDANTS' SECOND
MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO
THE CENTRAL INTELLIGENCE AGENCY
2. THIRD DECLARATION OF DAVID M. GLASS

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1 REPLY IN SUPPORT OF DEFENDANTS'
2 SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT
3 AS TO THE CENTRAL INTELLIGENCE AGENCY

4 STATEMENT

5 In this action under the Freedom of Information Act (FOIA), 5 U.S.C.

6
7 § 552, plaintiff, H. Ray Lahr, seeks compliance with certain requests for records
8 that he submitted to the National Transportation Safety Board (NTSB) and the
9 Central Intelligence Agency (CIA) by letters dated October 8, 2003. *See* 2d Am.
10 Compl. ¶¶ 6-8, 12, 19. The requested records deal with the explosion in 1996 of
11 TWA Flight 800. Moye Decl. at 48; 1st Buroker Decl. at 72. Plaintiff is a
12 conspiracy theorist who believes that "[t]he government covered up the true cause
13 of the disaster – missile fire" and that "a conspiracy to obstruct justice" existed.
14 Pl.'s Opp'n CIA's Mot. Partial Summ. J. (June 5, 2006) (Pl. Mem.) at 10, 21.

15 Defendants, the NTSB, the CIA, and the National Security Agency (NSA),
16 have filed three motions for partial summary judgment: (1) NTSB's Motion for
17 Partial Summary Judgment (NTSB Motion); (2) Defendants' Motion for Partial
18 Summary Judgment as to the CIA (First CIA Motion); and (3) Defendants' Second
19 Motion for Partial Summary Judgment as to the CIA (Second CIA Motion). The
20 NTSB Motion addresses the search for records that the NTSB conducted and 29
21 records from which material has been withheld pursuant to the statutory

1 exemptions to FOIA, 5 U.S.C. § 552(b). Mem. P. & A. Supp't NTSB's Mot.
2 Partial Summ. J at 4-5, 5 n.2, 10-25; see Moye Decl. 303-452, 456-60, 463-98.
3
4 The First CIA Motion addresses the search for records that the CIA conducted and
5 26 records from which material has been withheld pursuant to the statutory
6 exemptions. Mem. P. & A. Supp't Defs.' Mot. Partial Summ. J. as to CIA at 8-25;
7 see 2d Buroker Decl. ¶ 8. The Second CIA Motion addresses 12 records from
8 which material has been withheld pursuant to the statutory exemptions. Mem. P.
9 & A. Supp't Defs.' 2d Mot. Partial Summ. J. at 2-16; see Giles Decl. ¶ 7; 3d
10 Buroker Decl. at 50-56; 1st Supp. Moye Decl. ¶¶ 6(a)-(d). Taken together, the
11 three motions address all issues presented in this case, including all responsive
12 records from which contested withholdings have been made.
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16 Plaintiff opposes the Second CIA Motion. However, he has not shown that
17 the CIA has conducted an insufficient search for records; that any of the statutory
18 exemptions has been misapplied to any of the records covered by the Second CIA
19 Motion; that any segregable nonexempt material has been withheld from any of
20 those records; or that any such record should be reviewed *in camera*. The Second
21 CIA Motion should therefore be granted.
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ARGUMENT

I. PLAINTIFF HAS NOT SHOWN THAT THE CIA HAS CONDUCTED AN INSUFFICIENT SEARCH FOR RECORDS.

When plaintiff responded to the First CIA Motion, he alleged that the CIA had conducted an insufficient search for records because he believed that certain records existed for which the CIA had failed to account. See Pl.'s Mem. Opp'n CIA's Mot. Partial Summ. J. (Sept. 13, 2005) at 26, 28; Pl.'s Sur-Reply CIA's Reply Opp'n Mot. Partial Summ. J. at 11-13. In his opposition to the Second CIA Motion, he recycles the same argument. Pl. Mem. at 23. However, the argument has no more merit now than it did when plaintiff first made it. An agency receiving a FOIA request must conduct "a search reasonably calculated to uncover all relevant documents." *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995) (quoting *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985)). In adjudicating the sufficiency of a search, "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Citizens Comm'n*, 45 F.3d at 1328 (quoting *Zemansky*, 45 F.3d at 1328) (emphasis in the original). Accordingly, "the agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does

1 not undermine the determination that the agency conducted an adequate search for
2 the requested records.” *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C.Cir. 2004).
3

4 In this case, the CIA has described in detail the search for responsive
5 records that it has made. See 1st Buroker Decl. ¶¶ 15-25. Plaintiff has not
6 identified any place where the CIA should have looked, but did not. Nor has he
7 shown that the CIA has failed otherwise to “conduct[] a search reasonably
8 calculated to uncover all relevant documents.” See *Citizens Comm’n*, 45 F.3d at
9 1328 (quoting *Zemansky*, 767 F.2d at 571). His allegation that the CIA has
10 conducted an insufficient search for records should therefore be rejected.
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14 **II. PLAINTIFF HAS NOT SHOWN THAT ANY OF THE STATUTORY**
15 **EXEMPTIONS HAS BEEN MISAPPLIED TO ANY RECORD COVERED**
16 **BY THE SECOND CIA MOTION.**

17 **A. *Plaintiff Has Not Shown That Exemption 2 to Has Been Misapplied to***
18 ***Any of the Records Covered by the Aforesaid Motion.***

19 The NSA has relied on Exemption 2 to withhold, from the records covered
20 by the Second CIA Motion, the computer program that the CIA used to prepare its
21 simulation of the explosion of TWA Flight 800. See Giles Decl. ¶¶ 7, 11. Plaintiff
22 contests the withholding by alleging that Exemption 2 “relates only to the internal
23 rules [or] practices of an agency.” Pl. Mem. at 21 (purporting to quote “the
24 Attorney General’s Oct[.] 12, 2001 Report”; in fact quoting S. Rep. No. 813, 89th
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1 Cong., 1st Sess. 8 (1965)). However, the interpretation of Exemption 2 upon
2 which plaintiff relies was rejected in *Hardy v. Bureau of Alcohol, Tobacco &*
3 *Firearms*, 631 F.2d 653 (9th Cir. 1980). Adopting the interpretation of Exemption
4 2 contained in H.R. Rep. No. 1497, 89th Cong, 2d Sess. 10 (1966), *Hardy* held
5 that "law enforcement materials, the disclosure of which may risk circumvention
6 of agency regulation, are exempt under Exemption 2." 631 F.2d at 656.
7

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9 In this case, the NSA has relied on the interpretation of Exemption 2
10 adopted in *Hardy* to withhold the computer program used by the CIA to prepare its
11 simulation of the explosion of TWA Flight 800. *See* Giles Decl. ¶¶ 10-11.
12 Plaintiff has not attempted to show – let alone shown – that the program is *not*
13 entitled to protection under that interpretation. *See* Pl. Mem. at 21. The
14 withholding of the program should therefore be upheld.
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18 B. *Plaintiff Has Not Shown That Exemption 3 Has Been Misapplied to*
19 *Any of the Records Covered by the Second CIA Motion.*

20 1. *Plaintiff Has Not Shown That Exemption 3 Has Been*
21 *Misapplied by the NSA to Any of the Records Covered by the*
22 *Second CIA Motion.*

23 As an alternative ground for withholding the aforementioned computer
24 program, the NSA has relied on Exemption 3 and § 6(a) of the NSA Act of 1959,
25 50 U.S.C. § 402 note. *See* Giles Decl. ¶¶ 12-14. Plaintiff contests the withholding
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1 on two grounds. First, he alleges that the CIA, the NSA, or both have placed
2 improper reliance on Exemption 3 and § 6(a) to withhold simulations prepared
3 through the use of the program, or material input into the program to produce the
4 simulations. See Pl. Mem. at 19, 20. Plaintiff is mistaken. Only the program has
5 been withheld pursuant to Exemption 3 and § 6(a), and only the NSA has withheld
6 it.
7

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9 Second, plaintiff alleges that the "*Vaughn* index" that the NSA has
10 submitted in support of the withholding contains insufficient information to permit
11 the withholding. See Pl. Mem. at 19. Here, too, plaintiff is mistaken. "[W]hen the
12 affidavit submitted by an agency is sufficiently detailed to establish that the
13 requested documents should not be disclosed, a *Vaughn* index is not required."
14 *Minier v. CIA*, 88 F.3d 796, 804 (9th Cir. 1996). Accordingly, "no need for a
15 *Vaughn* index" exists "when a FOIA requester has sufficient information to
16 present a full legal argument." *Id.*
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21 The text of § 6(a) permits the withholding of "any information with respect
22 to the activities of [the NSA]." The protection provided by § 6(a) "is, by its very
23 terms, absolute." *Linder v. NSA*, 94 F.3d 693, 698 (D.C. Cir. 1996). Accordingly,
24 the NSA need only show that a particular record "concern[s] a specific NSA
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1 activity” and that its disclosure “would reveal information integrally related to that
2 activity.” *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1390 (D.C. Cir. 1979).
3

4 In this case, the NSA alleges that the disclosure of the above computer
5 program “could expose how the U.S. Government analyzes the performance
6 characteristics of foreign weapons systems that are aerodynamic or ballistic.”
7

8 Giles Decl. ¶ 11. By so alleging, NSA has given the parties “sufficient
9 information to present a full legal argument” as to the applicability of § 6(a) to the
10 program. *See Minier*, 88 F.3d at 804. Plaintiff makes no attempt to present such
11 an argument, much less a persuasive attempt. *See Pl. Mem.* at 19-20.
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14 2. *Plaintiff Has Not Shown That Exemption 3 Has Been*
15 *Misapplied by the CIA to the Records Covered by the Second*
16 *CIA Motion.*

17 The CIA has relied on Exemption 3 and 50 U.S.C. § 403g to withhold, from
18 five of the records covered by the Second CIA Motion, the names of CIA
19 personnel. 3d Buroker Decl. ¶ 9. Conceding that he “could not find a case where
20 a court ordered the disclosure of CIA names,” plaintiff asks that a “balancing test”
21 be applied to Exemption 3 and that the names be disclosed. *See Pl. Mem.* at 20-
22 21. However, “the sole issue for decision [under Exemption 3] is the existence of
23 a relevant statute and the inclusion of withheld material within that statutes’s
24 coverage.” *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1979). Accordingly, it is
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1 well established that no "balancing test" exists under Exemption 3. *See, e.g.*,
2 *McDonnell v. United States*, 4 F.3d 1227, 1248 (3d Cir. 1993) (holding that the
3 withholding of grand jury material under Exemption 3 does not require application
4 of a "factual balancing test"); *id.* at 1250 n.17 (holding that "a court reviewing an
5 agency's withholding under Exemption 3 does not balance the privacy interest of
6 the subject of the documents, as it should in applying Exemption 7(C)") & 1250
7 n.17; *Meyerhoff v. U.S. EPA*, 958 F.2d 1498, 1505 n.3 (9th Cir. 1992) (Rymer, J.,
8 concurring) (stating that "presuming a balancing result in the face of congressional
9 silence" would "render Exemption 3 superfluous"); *Fla. Immigrant Advocacy Ctr.*
10 *v. NSA*, 380 F. Supp. 2d 1332, 1334 (S.D. Fla. 2005) (holding that, "if either
11 Exemption 1 or 3 of the FOIA applies, that is an absolute bar to the Plaintiff's
12 request without resort to the balancing of Plaintiff's need for the information
13 verses [sic] the extent of the national security interests involved").

14
15 Even assuming, *arguendo*, that a "balancing test" did exist under Exemption
16 3, disclosure of the names that the CIA has withheld would not be justified.
17 Plaintiff alleges that the individuals whose names have been withheld "have
18 committed crimes." Pl. Mem. at 20. However, he points to no evidence that
19 would "warrant a belief by a reasonable person" that anyone engaged in criminal
20 behavior when he or she took part in the analysis of the explosion of TWA Flight
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1 800 that the CIA conducted. *See Nat'l Archives & Records Admin. v. Favish*, 541
2 U.S. 157, 174 (2004). Accordingly, no justification would exist for disclosure of
3 the names that the CIA has withheld even assuming, *arguendo*, that a balancing
4 test existed under Exemption 3.
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7 C. *Plaintiff Has Not Shown That Exemption 4 Has Been Misapplied to*
8 *Any of the Records Covered by the Second CIA Motion.*

9 The CIA has relied on Exemption 4 to withhold, from two records covered
10 by the Second CIA Motion, "information relate[d] to the flight characteristics and
11 performance of Boeing 747, for example, lift coefficient, drag coefficient, and
12 pitching moment coefficient data." 3d Buroker Decl. ¶ 10. The Boeing Company
13 (Boeing) considers this information to be proprietary and so, therefore, does the
14 CIA. *See id.*
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16
17 Contesting the withholding of this information, plaintiff alleges that "there
18 is no chance that Boeing would suffer a substantial competitive injury upon
19 disclosure" because the Boeing 747 is "an aircraft placed in service 38 years ago,
20 and since succeeded by three successive models." Pl. Mem. at 12, 13. However,
21 this allegation is undercut by Boeing's continued production and marketing of new
22 and modified 747s. As a recent news article stated:
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1 Boeing has confirmed that first deliveries of its stretched
2 fuselage B747-8 freighter will take place in 2009.
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4 Luxembourg airline Cargolux has already ordered 10, while
5 Nippon Cargo Airlines has placed a firm order for eight of the
6 aircraft.
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8 Further orders are anticipated from Nippon Cargo because the
9 carrier, an offshoot of leading shipping line Nippon Yusen Kaisha,
10 has said it will operate 14 advanced Boeing 747-8Fs in 2009 and up
11 to 24 in 2015.
12

13 * * * *
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15 [Boeing sales and marketing vice-president Randy Tinseth
16 said] production of the 747-400 freighter would stop when the 747-8
17 variant entered service.
18

19 The company had "a handful of positions left" for the 747-400
20 freighter, he said. Cathay Pacific Airways has already expressed
21 interest in taking some of the aircraft, according to media reports.
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23 Asked * * * if the 747-8 freighters would compete for orders
24 with the existing 747-400 freighters and Boeing's programme to
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1 convert 747-400s to freighters, Mr. Tinseth believed there was
2 enough demand for all three types.
3

4 Keith Wallis, *Lengthened Boeing Freighters Earmarked for 2009 Delivery*,
5 Lloyd's List Int'l (June 5, 2006) (3d Glass Decl. at X).
6

7 Because the 747 continues to be an important part of Boeing's business,
8 plaintiff is wrong to suggest that "there is no chance that Boeing would suffer a
9 substantial competitive injury" if the material withheld pursuant to Exemption 4
10 were disclosed. Pl. Mem. at 12. Accordingly, plaintiff has not shown that
11 defendants have misapplied Exemption 4 to the records covered by the Second
12 CIA Motion.
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15 D. *Plaintiff Has Not Shown That Exemption 5 Has Been Misapplied to*
16 *Any of the Records Covered by the Second CIA Motion.*

17 The NTSB has relied on Exemption 5 and the deliberative process privilege
18 to withhold, from two of the records covered by the Second CIA Motion, certain
19 "preliminary radar data." 1st Supp. Moye Decl. ¶¶ 6(a), (d). Contesting the
20 withholding of the data from one of those records, plaintiff alleges that "[c]harts
21 of radar data are simply factual evidence, to which there is no deliberative process
22 privilege." Clarke Decl. at 59.¹ However, plaintiff ignores the fact that "[t]he
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26 ¹This objection appears in an exhibit to plaintiff's memorandum in
27 (continued...)
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1 author(s) culled these data from an enormous collection of radar returns to
2 contribute to the flight path derived from the [NTSB's] simulations." 1st Supp.
3 Moye Decl. ¶ 6(d). Accordingly, he ignores the fact that "[t]he very act of
4 distilling the significant facts from the insignificant facts constituted an exercise of
5 judgment by agency personnel." *Id.*

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8 The NTSB has also relied on Exemption 5 and the deliberative process
9 privilege to withhold, from two of the records covered by the Second CIA Motion,
10 certain graphs that "depict various versions of the radar data provided by the
11 Federal Aviation Administration (FAA) for TWA flight 800" and certain graphs
12 that "depict various outcomes of the Main Wreckage Simulation for TWA flight
13 800, depicting differing parameters on the x and y axes." 1st Supp. Moye Decl.
14 ¶¶ 6(b), (c). Contesting the withholding of these graphs, plaintiff alleges without
15 having seen the graphs that they involve "false assumptions." Clarke Decl. at 58.
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17 However, the deliberative process privilege protects "subjective documents which
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21 ¹(...continued)
22 opposition to the Second CIA Motion, not in the memorandum itself. The same is
23 true of other objections that plaintiff makes. *See, e.g.,* Clarke Decl. at 58.
24 However, plaintiff's memorandum is already as long as L.R. 11-6 permits. For
25 this reason alone, this objection should be rejected. *See Solaia Tech. LLC v.*
26 *Arvinmeritor, Inc.*, 361 F. Supp. 2d 797, 826 (N.D. Ill. 2005) (striking a "seven-
27 page extended exegesis" on the ground that the exegesis constituted "an improper
28 attempt to file seven additional pages of argument in violations of page limits for
the briefs") (emphasis omitted).

1 reflect the personal opinions of the writer rather than the policy of the agency.”

2 *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir.
3 1997) (quoting *Assembly of the State of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d
4 916, 920 (9th Cir. 1992)). In this case, the graphs that the NTSB has withheld
5 reflect just such “personal opinions” 1st Supp. Moye Decl. ¶ 6(c) & p. 74.
6

7 Accordingly, the graphs are entitled to protection under Exemption 5 and the
8 deliberative process privilege even assuming, *arguendo*, that the assumptions they
9 involve are “false.”
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12 E. *Plaintiff Has Not Shown That Exemption 6 Has Been Misapplied to Any of*
13 *the Records Covered by the Second CIA Motion.*

14 The CIA has relied on Exemption 6 to withhold, from three of the records
15 covered by the Second CIA Motion, the names of special agents of the Federal
16 Bureau of Investigation (FBI) and of eyewitnesses to the explosion of TWA Flight
17 800. 3d Buroker Decl. ¶ 9. Plaintiff contests its having done so. Pl. Mem. at 16
18 n.48. For two reasons, he has no basis for doing so.
19

20 First, Exemption 6 requires “a court [to] balance the public interest in
21 disclosure” against the interest that an individual possesses in the “control of
22 information concerning his or her person.” *U.S. Dep’t of Defense v. Fed. Labor*
23 *Relations Auth. (FLRA)*, 510 U.S. 487, 495, 500 (1994) (quoting *Dep’t of Justice*
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1 v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763, 776 (1989)).

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3 “[T]he only relevant ‘public interest in disclosure’ to be weighed in this balance is
4 the extent to which disclosure would serve ‘the core purpose of the FOIA,’ which
5 is ‘contribut[ing] significantly to public understanding of the operations or
6 activities of the government.’” *FLRA*, 510 U.S. at 495 (quoting *Reporters Comm.*,
7 489 U.S. at 775) (emphasis omitted). In this case, plaintiff alleges that the names
8 of the eyewitnesses should be disclosed because disclosure “would enable the
9 public to ask these eyewitnesses whether they are amenable to being interviewed,
10 and would shed light on the agency’s performance.” Clarke Decl. at 69.
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14 However, none of the eyewitnesses whose names have been withheld took part in
15 the analysis of the explosion of TWA Flight 800 that the CIA conducted.

16 Accordingly, none of them could “shed [any] light on the agency’s performance.”

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18 *See id.*

19
20 Second, the eyewitnesses as a group have an interest in avoiding
21 “annoyance or harassment.” *See* 1st Buroker Decl. ¶ 34. However, “annoyance
22 [and] harassment” are precisely what would happen if “the public” were given
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1 information about the eyewitnesses that would lead to their being pestered for
2 interviews. The withholding of their names should therefore be upheld.²
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4 F. *Plaintiff Has Not Shown That Exemption 7(C) Has Been Misapplied*
5 *to Any of the Records Covered by the Second CIA Motion.*

6 Alternatively, the CIA has relied on Exemption 7(C) as a ground for
7 withholding the names of the aforesaid FBI agents and eyewitnesses. 3d Buroker
8 Decl. ¶ 9. Contesting its having done so, plaintiff alleges that the CIA “does not
9 have law enforcement power to conduct an investigation.” Pl. Mem. at 17.
10 However, Exemption 7(C) applies by its terms to “records or information
11 compiled for law enforcement purposes,” not merely to investigatory records.
12 Accordingly, it is immaterial whether the CIA “ha[s] law enforcement power to
13 conduct an investigation.” Even assuming, *arguendo*, that it *were* material, the
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18 ²When plaintiff responded to the First CIA Motion, he did not oppose the
19 use of Exemption 6 or, in the alternative Exemption 7(C) to withhold, from the
20 records covered by the First CIA Motion, the names of FBI agents or of
21 eyewitnesses to the explosion of TWA Flight 800. To the contrary, he said:
22 “Plaintiff does not contest the CIA’s withholdings of the names of individuals.”
23 Pl.’s Mem. Opp’n CIA’s Mot. Partial Summ. J. (Sept. 13, 2005) at 21. Changing
24 his position, he now alleges that he *does* contest the use of the above exemptions
25 to withhold, from those records, the names of FBI agents and eyewitnesses. *See*,
26 *e.g.*, Clarke Decl. at 68. However, his statement that he did *not* contest the
27 withholding of such names from such records should be should be treated as a
28 binding waiver. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (defining a
waiver as the “‘intentional relinquishment or abandonment of a known right’”) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

1 CIA conducted its analysis of the explosion of TWA Flight 800 solely because the
2 FBI asked it to do so as part of the criminal investigation, concerning the
3 explosion, that the FBI was conducting. 1st Buroker Decl. ¶ 50. In addition, the
4 CIA has withheld the names of the FBI agents and eyewitnesses solely because the
5 FBI asked it to do so. 3d Buroker Decl. ¶ 9. Plaintiff does not allege that the FBI
6 lacks "law enforcement power to conduct an investigation."
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9 Plaintiff also contests the withholding of the names on the ground that
10 Exemption 7(C) may not be used to redact the names of "high level government
11 employees." Pl. Mem. at 17. However, the names of "high level government
12 employees" have not been redacted here. To the contrary, the names that have
13 been redacted are the names of "FBI special agents." 3d Buroker Decl. ¶ 9.
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15
16 Plaintiff further contests the withholding of the names on the ground that
17 "overwhelming evidence" exists of "the CIA's dishonesty with regard to
18 eyewitness accounts." Pl. Mem. at 16. However, a requester who wishes to
19 contest the withholding of material under Exemption 7(C) by "show[ing] that
20 responsible officials acted negligently or otherwise improperly in the performance
21 of their duties * * * must produce evidence that would warrant a belief by a
22 reasonable person that the alleged Government impropriety might have occurred."
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24 *Favish*, 541 U.S. at 173. In this case, plaintiff has produced no evidence
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1 suggesting that anyone who worked for the CIA handled any eyewitness account
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3 “dishonest[ly],” i.e., in a manner “‘characterized by fraud; indicating a lack of
4 probity; knavish; fraudulent; unjust’ or ‘disposed to cheat or defraud.’” *See*
5 *Sherwood & Roberts – Kennewick, Inc. v. St. Paul Fire & Marine Ins. Co.*, 322
6 F.2d 70, 74-75 (9th Cir. 1963) (quoting *Webster’s New International Dictionary*
7 (2d ed.)). Accordingly, plaintiff has not shown that the CIA has misapplied
8
9 Exemption 7(C) to any record covered by the Second CIA Motion.
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11 **III. PLAINTIFF HAS NOT SHOWN THAT ANY SEGREGABLE**
12 **NONEXEMPT MATERIAL HAS BEEN WITHHELD FROM ANY**
13 **RECORD COVERED BY THE SECOND CIA MOTION.**

14 Plaintiff alleges that defendants have failed to release segregable non-
15 exempt material from nine of the records at issue in this case. Clarke Decl. at 61-
16
17 66. However, none of those records is a record covered by the Second CIA
18 Motion. *See id.*

19 **IV. PLAINTIFF HAS NOT SHOWN THAT ANY RECORD COVERED BY**
20 **THE SECOND CIA MOTION SHOULD BE REVIEWED *IN CAMERA*.**

21 FOIA “does not mandate that the documents be individually examined in
22
23 every case.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1976). To
24 the contrary, the *in camera* review of responsive records is a “discretionary”
25
26 procedure, to be employed “when the issue before the District Court could not be
27
28

1 otherwise resolved.” *Id.* Accordingly, “an *in camera* inspection, even of one
2 document, should not be undertaken to satisfy the whim of a party that a searching
3 inquiry is required if only to provide peace of mind. * * * * In other words, *in*
4 *camera* review should not be used routinely on the theory ‘it can’t hurt.’” *Xerox*
5 *Corp. v. United States*, 12 Cl. Ct. 93, 95 n.3 (1987) (quoting *Ray v. Turner*, 587
6 F.2d 1187, 1195 (D.C. Cir. 1978)).
7

8
9 In this case, plaintiff asks the Court conduct an *in camera* review of one of
10 the records covered by the Second CIA Motion because he believes that the CIA
11 has relied on Exemption 3 and 50 U.S.C. § 403g to redact the names of “high level
12 officials.” Clarke Decl. at 79. However, plaintiff is wrong to believe that the
13 names of “high level officials” are not protected by § 403g:
14
15

16 Section 403g provides “that in order to implement [50 U.S.C.
17 § 403–1(i)], . . . the Agency shall be exempted” from disclosing “the
18 organization, functions, *names*, official titles, salaries, or numbers of
19 personnel employed by the agency.” Reading these two statutes
20 together, the CIA may withhold the names of its employees because
21 release of this information would disclose “sources and methods” of
22 intelligence gathering. Thus, the plain language of §§ [403–1(i)] and
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1 403g expressly provides that the CIA is exempted from disclosing the
2 names of its employees.
3

4 *Minier*, 88 F.3d at 801 (citations omitted; emphasis in the original).

5 Section 403g does not provide that the CIA may withhold the names of
6 certain of its employees, but not the names of others. The request of plaintiff that
7 the Court conduct an *in camera* review of the above record should therefore be
8 denied.
9
10

11 CONCLUSION

12 For the foregoing reasons, the Second CIA Motion should be granted.
13

14 Respectfully submitted,

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19

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